

**FEDERAL COURT
PROPOSED CLASS PROCEEDING**

B E T W E E N:

**VOLTAGE PICTURES, LLC, COBBLER NEVADA, LLC, PTG NEVADA, LLC, CLEAR
SKIES NEVADA, LLC, GLACIER ENTERTAINMENT SARL OF LUXEMBOURG,
GLACIER FILMS 1, LLC, AND FATHERS & DAUGHTERS NEVADA, LLC**

**APPLICANTS
(PLAINTIFFS)**

- and -

JOHN DOE #1, proposed representative Respondent on behalf of a class of Respondents

**RESPONDENT
(DEFENDANT)**

**REPLY MOTION RECORD
OF THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC
INTEREST CLINIC (CIPPIC)**

(Motion for leave to intervene, to be heard in writing)

Pursuant to Rules 109 and 369 of the Federal Code Rules

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WRITTEN REPRESENTATIONS

OVERVIEW

1. These written representations constitute the reply of the Proposed Intervener, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), on its motion for leave to intervene in this matter involving a motion for third party disclosure brought by the Applicants, Voltage Pictures, LLC, et al. This form of third party discovery is often referred to in Canada as a *Norwich* order.

2. The key remaining points of disagreement between the Applicants and the Proposed Intervener in this motion relate to the scope of CIPPIC's proposed intervention. The Applicants address two specific points of CIPPIC's proposed intervention, submitting that these are redundant or premature, respectively.

3. CIPPIC proposes to offer submissions regarding the potential impact of newly adopted legislative reforms on the historical ability of intermediaries to recover costs in the context of third party discovery motions such as that at issue here. The Applicants submit that this issue is adequately represented by the non-party Respondent, Rogers Communications Inc, whose interests are directly implicated by the potential costs that will be imposed on it if the Applicants are successful on this issue.

4. The Applicants also submit that, to the extent CIPPIC seeks to address issues relating to the nature or intentions of Doe # 1's role as a representative of the defendant class proposed by the Applicants, these considerations are premature and more appropriately raised at the class certification stage, if at all.

5. CIPPIC addresses these two points below.

TEST FOR INTERVENTION

6. The test for intervention is that recently affirmed by the Federal Court of Appeal in *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44 ("*Sport Maska*"). The test for granting intervention is flexible, with the key consideration being whether the participation of the proposed intervener will assist the Court in determining the factual or legal issues before it by advancing "further, different and valuable insights and perspectives".

Sport Maska Inc v Bauer Hockey Corp, 2016 FCA 44, para 40, 42; *Pictou Landing Band Council v Canada (Attorney General)*, 2014 FCA 21, para 9 factor 6; *Apotex Inc v Canada (Minister of Health)*, [2000] FCJ No 248, 186 FTR 84 (FCTD), para 11; CIPPIC, Motion for Leave to Intervene, Written Representations, ("CIPPIC, WR"), paras 6-7

PROPOSED SUBMISSIONS ON COST RECOVERY & LEGISLATIVE REFORM

7. This will constitute the first application of recently adopted legislative reforms to the historical status quo, by which innocent third party respondents were granted the right to recover any costs arising from their participation in third party discovery motions such as this. CIPPIC acknowledges that the non-Party Respondent in this matter, Rogers, has a personal interest in addressing the issue of cost recovery. However, most proposed interventions will address issues that will be defended by at least one party to the extent these interests intersect with that party's personal interests.

Sport Maska Inc v Bauer Hockey Corp, 2016 FCA 44, CIPPIC Motion Record, Motion for Leave to Intervene ("CIPPIC, Motion Record"), Tab 16, para 40, 42; *Pictou Landing Band Council v Canada (Attorney General)*, 2014 FCA 21, Applicants' Responding Motion Record, Book of Authorities ("Appellants' BOA"), Tab 3, para 9 factor 6

8. The matter under consideration raises novel points of law, with implications extending beyond those of Rogers' cost recovery. The status quo in third party discovery has been that the costs of discovery will not be imposed on innocent intermediaries or their customers. This has been

a matter of public policy debate in the legislative development of the underlying amendments to the *Copyright Act* which are at issue herein, in the regulatory process that followed the adoption of these mechanisms, and in past judicial proceedings requesting comparable *Norwich* orders. The outcome of this question will not only affect Rogers, but also its customers. In addition, it will affect the costs of other entities operating under different conditions than Rogers, including smaller service providers who may be less able to bear the costs in question and entities such as search engines that are also subject to the regime in question (and the customers of such distinct entities).

BMG Canada Inc v Doe, 2005 FCA 193; Voltage Pictures LLC v Doe, 2014 FC 161

9. CIPPIC is well placed to inform the Court on the potential implications of its order for these other entities and for copyright enforcement more broadly. Its submissions on this point will therefore offer a different perspective than those of Rogers, and will not be duplicative. CIPPIC has been granted leave to intervene on this specific issue in the past, even where a non-party respondent such as Rogers was already present and willing to defend their interests in the matter. Finally, CIPPIC notes in most instances, an intervention will be aligned with one party or the other. The Court may, in such instances, grant the Applicants the right to provide more extensive submissions, so that the Applicants are able to address any additional considerations raised by an intervention, should such leave be granted.

BMG Canada Inc v Doe, 2005 FCA 193; Voltage Pictures LLC v Doe, 2014 FC 161

PROPOSED SUBMISSIONS ON SPECIFIC RISKS POSED TO DOES

10. Whereas the predominant majority of interventions will involve matters already defended by an interested party, *Norwich* requests pose a particular challenge as any implicated Does will not be before the Court to defend their own interests. The *Norwich* framework has also raised special challenges that have required dynamic safeguards tailored to the various contexts in which they are sought. As noted by the Applicants, this proceeding constitutes the “first ‘reverse class action’ in Canadian history for copyright infringement” and, by extension, the first ever application of the *Norwich* framework in this context.

Applicants, Responding Motion Record, Written Representations (“Applicants, Responding WR”), para

11. CIPPIC acknowledges that it is atypical to address concerns relating to class representation prior to the certification stage of a class action. However, it is in the nature of the *Norwich* framework that Courts will by necessity address issues at an early stage of the litigation. In *BMG Canada Inc v Doe*, 2005 FCA 193, for example, the Federal Court of Appeal assessed the quality of the Applicants' evidence – a matter typically addressed at later stages of a lawsuit. In *Voltage Pictures LLC v Doe*, 2014 FC 161 (“*Teksavvy*”), this Court assessed the need to ensure that Does identified by means of the *Norwich* order will not be presented with settlement demands claiming excessive damages or implying that determination of liability has been made against the Doe. In addition, Courts in Canada and abroad have utilized the *Norwich* process to assess the propriety of the procedural mechanism a plaintiff seeks to advance by means of third party discovery.

Voltage Pictures LLC v Doe*, 2014 FC 161, paras 80, 98, 106, 127 and 134; CIPPIC, WR, paras 16 *et seq

12. The *Norwich* order sought herein raises challenges that are similar to those raised in past instances, with variations to account for the specific context of the novel reverse class action proceeding this *Norwich* order seeks to advance. Many courts addressing *Norwich* orders in this context have recognized that the Does sought to be identified have no incentive to mount a rigorous legal defence in court in light of the potential quanta of damages at issue. This is one of the legally recognized hazards that should be addressed by the imposition of safeguards into the *Norwich* process. This concern is no less salient with respect to the Does in this proceeding, including Doe #1. Indeed, the Does in this proceeding are identically situated to those in *Voltage Pictures LLC v Doe*, 2014 FC 161 and other proceedings around the world summarized therein. While this Court could reassess issues relating to the intent of Does to defend small copyright claims in court, this would, in CIPPIC's respectful view, be time consuming and unnecessary in light of this Court's recent decision in *Voltage Pictures LLC v Doe*, 2014 FC 161.

***Voltage Pictures LLC v Doe*, 2014 FC 161, paras 105-106, 134; CIPPIC, WR, paras 19-24**

13. Class representatives are called upon to undertake rigorous and robust defences on behalf of the class they represent. This is wholly apposite to the nature of the majority of Does implicated in this context, as recognized by the jurisprudence. CIPPIC is of the view that concerns relating to the nature of the Does is therefore salient at the *Norwich* stage, particularly as many courts have used the *Norwich*

process to assess the procedural mechanism sought to be advanced by discovery. It is possible that these concerns can be addressed by the insertion of safeguards such as a requirement to clearly notify Doe #1 that no court has legally determined Doe #1 must serve as a class defendant. Regardless, these concerns are salient at this early stage. We respectfully submit that the Court will benefit from our submissions regarding the legally recognized challenges raised by Does implicated in the *Norwich* context.

CIPPIC, WR, paras 19-24

ADDITIONAL CONDITIONS OF INTERVENTION

14. As noted by the Applicants, CIPPIC will not seek costs in relation to its participation in this motion for third party discovery and have asked that costs not be awarded against it, to the extent that it participates responsibly.

15. The Applicants suggest that CIPPIC should not be granted appeal rights as part of its intervention. CIPPIC acknowledges that it is atypical for interveners to be granted a right of appeal. However, the particular exigencies of the *Norwich* context, where complex issues of law are raised but the affected Does are not before the Court, present a need for additional caution. Indeed, *Norwich* orders in the copyright peer-to-peer file-sharing context have been the subject of appellate consideration in the past. The availability of such appeal should not be conditioned on the willingness of a non-party respondent. Indeed, as noted above, Rogers will only be opposing the cost recovery component of the Applicants' motion.

***BMG Canada Inc v Doe*, 2005 FCA 193**

16. Finally, the underlying issues raised herein are complex. They have been the object of appellate consideration in the past, and have previously required full day hearings to resolve. In previous *Norwich* contexts, CIPPIC has been granted full party rights, including the right to cross-examine witnesses and the right to adduce evidence. In this particular context, CIPPIC has not sought the right to cross-examine or adduce evidence, yet CIPPIC nonetheless seeks sufficient latitude in order to ensure the Court is sufficiently aware of the potential implications of its order. CIPPIC will limit its written submissions to 10 pages, but asks that it be afforded no less than 20 minutes of oral argument should its intervention be granted. The ability to offer such argument will not unduly disrupt the proceeding, while ensuring the Court will have the opportunity to fully consider the implications raised by this matter. It will therefore contribute to the fair and efficient resolution of the matters raised herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of June, 2016.



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LIST OF AUTHORITIES**STATUTORY AUTHORITIES**

1. *Federal Court Rules*, SOR/98-106, Rules 109 and 334.21

CASE LAW

2. *Apotex Inc v Canada (Minister of Health)*, [2000] FCJ No 248, 186 FTR 84
3. *BMG Canada Inc v Doe*, 2005 FCA 193
4. *Pictou Landing Band Council v Canada (Attorney General)*, 2014 FCA 21
5. *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44
6. *Voltage Pictures LLC v Doe*, 2014 FC 161

SCHEDULE “A”

Court File No. T-662-16

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(DEFENDANT)**

ORDER

UPON MOTION by the applicant, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), for an order pursuant to Rule 109 of the *Federal Courts Rules*, 1998, SOR/98-106;

THIS COURT GRANTS LEAVE TO INTERVENE to the applicant in the aforementioned proceeding on the following terms:

1. CIPPIC shall be added to the style of cause as intervener;
2. CIPPIC shall be permitted to file a factum of no more than 10 pages;
3. CIPPIC shall be permitted to present no more than 25 minutes of oral arguments at the hearing of this application;
4. CIPPIC shall cooperate with all other parties, non-party respondents and interveners to expedite the hearing and avoid duplication;
5. Costs shall not be awarded against CIPPIC to the extent that it participates responsibly in the proceeding;
6. CIPPIC shall not be permitted to file evidence or cross-examine witnesses in this motion; and
7. CIPPIC shall be served with all materials filed and to be filed by other parties, non-party respondents and interveners.
